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SYMPOSIUM

Employment Relations Act

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Introduction

This issue of the *New Zealand Journal of Industrial Relations* is devoted to the Employment Relations Act 2000, which came into force on 2 October 2000. While the legislation has not yet had a chance to "bed down", it is nevertheless appropriate that an issue of this journal should consider it in its infancy, focussing in particular on those features that differentiate it from the law it replaces.

In the spirit of tripartism, the first three pieces in this collection are shorter articles expressing the views and concerns of the social partners concerning the new legislation (the Hon Margaret Wilson for government, Ross Wilson for trade unions, and Barbara Burton for employers). There then follows an overview from an industrial relations perspective that places the new legislation in context (Peter Boxall). The centrepiece of the legislation, the concept of "good faith", is then further explored in the following three articles. Firstly, the concept as it applies in the United States is discussed by a veteran attorney with the National Labor Relations Board who also happens to be an expert on the New Zealand labour law scene (Ellen Dannin). This is followed by articles on the formulation and implications of the interim Code of Good Faith (John Hughes) and the duty of good faith as it applies particularly to trade unions (Rodney Harrison). The final articles deal with two other areas that have been affected by the new legislation: individual employee rights (Gordon Anderson) and the specialist employment law institutions (Alastair Dumbleton).

In her paper "The Employment Relations Act: A Statutory Framework for Balance in the Workplace", the Hon Margaret Wilson, Minister of Labour, describes the aims of the new legislation, and discusses its broad political and policy background. The legislation was intended to steer a middle course between the Employment Contracts Act 1991 and the earlier now-outdated award system, in order to achieve a more balanced approach to economic and social policy. In relation to the new specialist institutions, the legislation is an attempt to meet the needs of the parties rather than those of the legal profession (a theme taken up later in Alastair Dumbleton's paper).

Ross Wilson, President of the New Zealand Council of Trade Unions ("Working under the Employment Relations Act 2000") reminds us of the controversy that accompanied the passage of the Employment Relations Act, and of the exaggerated rhetoric and fears

that had been raised before its enactment[1]. He places the new legislation in both a human and human rights context, and discusses it as part of a wider international and national vision. Although many of the fundamental reforms introduced by the Employment Contracts Act have been carried over into the new regime, the Employment Relations Act introduces a more fair framework for employment law. He acknowledges that the concept of good faith will be a key one in constraining and influencing behaviour under the new legislation, and that while its implications are not yet entirely clear, it will impact not only on employers' conduct, but that of unions as well (the theme explored by Rodney Harrison, below). Ross Wilson also briefly discusses his hopes in relation to the Interim Code of Good Faith (the formulation of which is treated by John Hughes, below).

Barbara Burton of the New Zealand Employers' Federation focuses on some of the extended individual rights in the new legislation (a point that is also flagged by Peter Boxall, and which is approached from a different perspective by Gordon Anderson, below). Her paper, "The Path to Subjectivity: The Decline of Certainty in Industrial Relations Law", traces a thirty year trend in the extension of the personal grievance provisions in both scope and application, culminating in a number of areas of uncertainty in the Employment Relations Act. In relation to the personal grievance procedure in particular, she sees the new legislation as a statutory embodiment of the judicial activism of the past decade. The main disadvantage that employers face here is that there is too much of a burden on them to anticipate possible individual employee situations that could adversely affect their interests and ability to defend themselves. She points in particular to a number of subjective matters that may well be beyond the employer's capacity to infer or predict: two of the grounds provided in the statute for submitting grievances out of time (employee traumatisation and failure of the employee's agent); the various possible employee disadvantages or conditions that underpin the unfair bargaining jurisdiction (s 68); and the recognition of indirect alongside direct sexual or racial harassment, discrimination, and duress. The concern here is that the level of individual employee protection in the new legislation is excessive, and the new legal tests are overly subjective, both of which will tend to discourage businesses from taking the risk of employing staff.

Peter Boxall ("Evaluating Continuity and Change in the Employment Relations Act 2000") provides an overall assessment of the Employment Relations Act in terms of industrial relations and labour market reform, and places his analysis in an historical and policy context. He concludes that the legislation represents a sound re-balancing of rights within essentially the same decentralised framework of the law it replaces. There are several issues, however, that raise a certain measure of uncertainty and that may need to be revisited. One is whether the protections for individual workers are now excessive. There are also uncertainties involved with the concept of "good faith" that has been introduced into the law (a subject explored in depth by Ellen Dannin, John Hughes, and Rodney Harrison). He also notes that the objectives of the new specialist employment institutions are much the same as those under the Employment Contracts

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[1] For a detailed analysis of the mainly Opposition fear-mongering, see Hughes, J. (2000) "Hot-Spots and Damp Squibs", *Employment Law Bulletin*, p.134-137.

Act, but that it is uncertain whether there will be an improvement in their performance (see Alastair Dumbleton, below, who draws attention to the fundamental differences between the Employment Relations Authority and the Employment Tribunal) .

The Employment Relations Act has borrowed heavily from North American concepts of "good faith" in industrial matters. Ellen Dannin's paper ("Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience") describes the role of the concept of "good faith" in United States labour law, particularly as it relates to three key areas which have yet to be fully worked out in New Zealand jurisprudence: collective bargaining, direct dealing between employers and their employees, and the disclosure of information. Dannin cautions that each country's law is unique and coloured by its context. She stresses the importance of this when legal concepts such as "good faith" are borrowed from elsewhere, so that we must take account of particular contexts of law, social attitudes, and practice. This means that New Zealand law will inevitably have to be worked out in local terms. North American precedents, however, can usefully indicate what sorts of issues are likely to arise, and how similar laws have been interpreted and applied elsewhere.

The paper by John Hughes ("The Collective Bargaining Code of Good Faith") deals with the background to the formulation of the interim Code of Good Faith, and places it in the context of the political and policy debates surrounding the enactment of the Employment Relations Act. The paper also examines the provisions of the Code in light of the current statutory and case law. In particular, Hughes points out that although some of the North American jurisprudence, developed over many years, has been conveniently worked into the various matters set out in s.32(1) of the Act, there are a number of key issues that have not been covered by that provision and which a code of practice could have usefully dealt with, such as surface bargaining and bargaining behaviour that is designed to ensure a breakdown in negotiations. Hughes concludes that because of a failure to reach consensus in the committee that formulated it, the Code has by default left a number of key issues for ultimate determination by the courts instead of by the social partners themselves. The question is therefore raised whether full advantage has been taken of the opportunity to develop codes of practice.

Rodney Harrison's paper ("Unions and Good Faith") focuses on how the legislation's broad concept of "good faith", and the wide range of "employment relations" to which it applies, might operate specifically in relation to union conduct, and in particular to the relationship between a union and its members. The paper draws a comparison with the union duty of "fair representation" in North America. Harrison suggests that the Act foreshadows an important change to the way unions will be required to conduct themselves. The paper also raises the issue whether the concept of "good faith" – at least outside the context of bargaining for collective agreements – will involve matters of substance as well as process. In this connection, Harrison points to provisions in the legislation that apply good faith behaviour to all aspects of the employment relationship, and suggests that good faith behaviour involves not only a negative duty to refrain from acting in bad faith, but a positive duty as well, which requires the parties to act in accordance with a particular standard of fairness and reasonableness.

As Gordon Anderson points out in his paper "The Individual and the Employment Relations Act", most employees are not union members, and even if the anticipated growth in unionisation under the new legislation takes place, this will still be of marginal significance to the great majority of employees, who will continue to bargain on an individual basis. Anderson's paper considers the new legislation from the perspective of the individual, non-unionised, employee working in an unorganised workplace, and considers what the reforms have achieved for such employees. Shortcomings identified by Anderson include retention of the 90 day time limit for raising grievances; limited reform of the law relating to fixed term contracts; the absence of any way to challenge oppressive terms in an employment agreement once the agreement has been entered into; and the failure to address the issue of remedies for redundancy.

The principal change to the specialist institutional arrangements under the new legislation is the abolition of the Employment Tribunal and its replacement by the separate mediation services and the Employment Relations Authority. In his paper "The Employment Relations Authority Gets Under Way", Alastair Dumbleton, the Chief of the Employment Relations Authority, surveys the functions, powers and procedure of the new Authority. He compares the Authority with the Tribunal, and suggests that the Authority is not simply an altered Tribunal, but a markedly different and unique institution. Whether or not the Authority will be more successful at its tasks than the Tribunal is a matter that is unable to be determined with confidence so early in its existence, but the prognosis looks positive so far.

Each of these papers, therefore, deals with important and novel aspects of the Employment Relations Act. The principal, overarching question, of course, is: will it all work? Will the new concepts and processes be straightforward in application? Will the new institutions work more efficiently and fairly than the old? To be sure, any legislative change of this scope will need a number of years to settle into place, and there will always be a need for litigation to nail down areas of uncertainty. Once the main contentious areas have been settled by the courts, however, the ultimate success of the legislation will inevitably be measured by the extent of any reforms by subsequent governments. On this measure, the Employment Contracts Act 1991 has proved to be somewhat more of a success than might have been predicted in the days immediately following the last change of government. With the addition of provisions promoting the role of unions and the new institutional arrangements, it may be that we are now on track to greater long-term stability in our labour law.